The governance of complementary global regimes and the pursuit of human security : the interaction between the United Nations and the International Criminal Court

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Part II

The Governance of Complementary Global Regimes: Challenges, Obstacles and Concerns

4 The challenges in the governance of complementary global regimes

Preliminary remarks

The governance of complementary global regimes dealing with war and crime requires significant efforts from relevant stakeholders, such as States, regional and multilateral organizations and civil society, just to name a few. There are still several obstacles to centralize individuals in situations of war and crime. The accomplishment of sustainable peace in many of them is problematic. The deterrent impact deriving from the fight against impunity is not self-sufficient in such situations. The previous part of this study explored the global values and the requirement of an integrated approach of governance between frameworks fostering human security. Such an approach requires systemic changes at structural, normative and functional levels. The interaction between international governance institutions of complementary character is not configured by primary but only by secondary law. The secondary law regulates the operational activities in the field, or so-called arrangements and agreements, where international governance institutions of complementary nature are both involved. In such context, an integrated approach of governance based on compulsory cooperation is required. These issues will also be extensively discussed in the case studies dealt with in the third part of this study. The purpose of this part is to promote the idea of an effective interaction strategy between complementary global regimes according to the human security doctrine and the rule of law in international relations. Before the recommendations addressed to the decision-makers would take place in the last section of this chapter, the attempt now is to explore the main challenges, obstacles and concerns in the governance of complementary global regimes at structural, normative and functional levels.

This part underscores the fact that the key to solve some of the relevant gaps governing war and crime is seen in the interaction between global regimes of complementary character. Hopefully, political convergence will be found in the immediate, middle and long terms with mandatory cooperation in both *referral* and *non-referral* activity coming from the Security Council to the Court. Unfortunately, the transition of governance systems fostering human security is compromised by several factors. The three chapters of this part deal respectively with the challenges in the governance of complementary regimes, the structure and competence of their institutions, and the requirement of political convergence to become complementary in accordance with

the constitution of the world community. This part will focus respectively on the governance of humanitarian escalations of *last resort* in the context of international peace and security, including the possible extention of jurisdiction of international crimes, and the gaps of law enforcement and civilian protection duties. It concludes that further evolution of global regimes governing war and crime depends from the policy formulations of their complementary character. The ideology and the political determination to end the impunity of serious crimes of common concern deserve some progress in the policy-making establishing human security measures at domestic, regional and international levels. Joint efforts between the UN and the Rome Statute institutional system should also help national capacities coping with mass atrocity crimes, while strengthening their national justice systems. A political *road map* of interactions for the sake of good governance is still not defined and in transition. Such a *road map* is considered an important opportunity. It would solve the gaps in the current legal and political frameworks upholding governance structures of complementary and universal character.

This part demonstrates that the supranational character of pluralistic legal frameworks and multilevel jurisdictions require further efforts for the preservation of the world order and the rule of law as an important principle of governance. The question of whether a global constitution exists or is emerging, and if so, what form it takes, is one of the most intriguing and controversial topic of recent international theory and has been extensively studied by several legal and political theorists.[1] Since in our globalized society the realization of an immutable world order is impossible and considered utopia, Delmas-Marty suggests policy adjustments that would preserve diversity. The rule of law "must be called upon to invent a flexible process of harmonisation that leaves room for believing we can agree on, and protect, global values".[2] In line with such considerations this part explores the new practice of international humanitarian escalations and the reach of universality of global institutions, including the first generation of referrals of the Security Council to the emerging regime of justice falling under the Rome Statute. The lacuna of civilian protection mechanisms calling for a 'culture of civilian protection' reminds the actors involved the importance to understand how their responsibilities for the protection of civilians during armed conflicts should be translated into action. Such view is also valid in regard to the *non-referral* activity when complementary actors function on the same grounds in the same situations. This part concludes that the design of a supranational global architecture fostering peace, justice and security lacks political convergence on the following clusters: *a)* collective security and the use of force based on humanitarian purposes and civilian protection duties; *b)* peace enforcement and peacekeeping deployed with mandates integrating and

1 See C. E. J. Schwöbel, *Global Constitutionalism in International Legal Perspective*, 2011.

2 M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, 2009.

supporting law enforcement; and *c)* post-conflict peace-building measures to guarantee sustainable peace in situations affected by war and crime.

In this part Chapter IV provides an analysis of global regimes and their transition in the new world order dealing respectively with the responsibility of the States and the accountability of the individuals. The ways these regimes are governed is important to preserve further the rule of law and its reach of universality. Their complementary character deserves clarifications and appropriate policy formulations in the direction of integrated governance systems. This chapter discusses some of the unresolved issues in the frameworks of international governance dealing with collective and human security and the important requirement of political consensus on such issues. Chapter V offers an overview of the governance structure of complementary global regimes including their competence and relationship, and points out the requirement of political convergence to reach global regimes of complementary character. These chapters indicate that systemic changes are required at structural, normative and functional levels in accordance with the constitution of the world community. There are uncertainties and instabilities about *last resort* international escalations based on humanitarian grounds. Justice is disconnected from peace. Security operations, civilian protections duties and law enforcement failed in regard to peace sustainability in several country-situations. This part also discusses the current political impasse in the formulation of international threats and crimes and the possible extension of their complementary governance (aggression, terrorism, weapons of mass destruction, etc.). The important requirements rewarding the idealistic view of an architecture fostering peace, justice and security based on further responsibilities (and against the practice currently applied when dealing with the international escalations of serious violations of international humanitarian law and human rights) is debated taking in consideration the theoretical dichotomy between *constitutionalism* and *pluralism* and further preservation of the world order. Thus, is it time for a change?

4.1 The reach of 'universality'

Section Outline

This section makes the point about the reach of universality between double standards in the selection of situations devastated by war and crime, and the challenges and opportunities in the application of civilian protection measures. The global support to the investigation and prosecution of serious crimes of common concern is absolutely required, including any monitoring and capacity-building activity for the use of police, army and judiciary supposed to protect civilians in situations of war and crime. The impact of international governance institutions on criminal behavior of States and individuals in situations of war and crime has been extensively dealt by valuable observers, while the complementary interaction between them is

still open for debate. In spite of their small sized character and the very few resources allocated outside the constellation of the UN entities, the institutions established under the Rome Statute have the potential to re-propose new approaches for the preservation of the international legal and political order. Such influence depends on several factors, and the most important of them require discussions. This section debates the gaps in the civilian protection measures detectable on the ground, as a reflection of the global humanitarian policies currently in place, the current practice of humanitarian escalations, and the dynamic of intervention in several situations of war and crime against the principles of universality and sustainability.

There are no doubts of the potential for the UN to play a key role in the strengthening of national justice systems by increasing the importance of the Rome Statute in the rule of law programming and development aid, including the security sector reforms of shattered domestic systems. The establishment of inquiry commissions by the UN Human Rights Council (UNHRC) in the situations where the Court is investigating would also benefit the collection of information and evidence useful for its judicial activities, while providing the Security Council with fundamental inputs regarding its referrals. Another important role for the UN would be the configuration of mandates on the ground supporting the activities of the Court as a prerequisite of an architecture fostering peace and justice in the context of human security. The current challenge is to provide real protection and halt the enduring violence in multiple situations of war and crime, while following judicial decisions enforcing the rule of law. The ideal would be that judicial decisions would not be neutralized by political approaches, but instead supported by legal and political responsibilities fulfilling the gaps in the relocation, rehabilitation and reparation as the main civilian protection measures, including law enforcement measures authorized, configured, and deployed on the ground in conflict and post-conflict situations.[3]

4.1.1 The limitations of civilian protection

An extension of capacity-building in situations of war and crime towards law enforcement and civilian protection measures is required. The simple question is: *how?* An initial step for the regime of international criminal justice would be to receive immediate support in the field operations by the political configurations of the peace-building mandates of the Security Council. The problem is that the responsibility to protect civilians in conflict zones with 'all necessary measures' (RtoP or R2P), and its language used in addition to the 'right' of humanitarian intervention with military means, are characterized by flawed decision-making based on the interests and alliances within political organs, and not upon an established legal

3 See M. W. Brough, J. W. Lango, H. van der Linden (eds.), *Rethinking the Just War Tradition*, 2007.

procedure of compulsory character, as a prerequisite of democratic governance. In contrast with the R2P, the doctrine of humanitarian intervention may be referred as military intervention in a State without the approval of its domestic authorities, and with the purpose of preventing widespread suffering or death among the inhabitants. This differs from the R2P on at least three grounds. First, the remit of humanitarian intervention which aims at preventing large scale suffering or death, whether artificial or not, is far broader than that of the R2P which focuses on the prevention of four crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. Second, the right of humanitarian intervention automatically focuses on the use of military force, by a State or a group of States against another State without its consent. As such, humanitarian intervention overlooks the arrays of preventive and non-coercive measures that are essential for the R2P. Last but not least, to the extent that the doctrine of humanitarian intervention is predicated on the basis of the right to intervene, it can proceed without the need to secure legal authorization by the Security Council, whereas any R2P action involving military force is not.[4] It is clear that the problem of delimiting the responsibility to protect, between sovereign nation-states, international governance institutions, and between them, shaping the legal frameworks in accordance which such norm, still remains.[5]

The same limitation applies to the humanitarian escalations referred to a treaty-based organization dealing with crimes internationally recognized, the jurisdiction of which struggles to hold accountable non-states actors without reliable law enforcement measures. Besides, the support and cooperation falling under such referrals precludes any mandatory character of political organs including their responsibility. The same limits apply in the configuration of mandates on the ground where peace enforcement operations do not follow up the international judicial activities and their outcomes. In other words, are we simply dealing with the arrays of 'symbolic politics' of law enforcement, or can we refer to a 'paradigm in the making' of governance systems dealing with sensitive human security issues in situations devastated by war and crime? In order to strengthen the role of complementary global regimes fostering human security towards civilian protection measures, further debate on such sensitive issues is required.

4 See E. Passarelli Hamann, R. Muggah (eds.), *Implementing the Responsibility to Protect: New directions for international peace and security?* Igarapé Institute, 2013, accessible at: http://igarape.org.br/wp-content/themes/igarape_v2/pdf/r2p.pdf

5 For an extensive overview see E. Gareth, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, 2008. A. J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, 2009. J. Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* 2010.

4.1.2 The practice of humanitarian escalations

The complexity of universality and a sustainable impact of complementary global regimes in difficult situations affected by war and crime are evident for several reasons. Some of them have been approached in the first part of this work and are further examined in the case studies selected. The memberships of the nation-states and the territoriality issue are only a couple of them, including the constitutional, legislative and institutional adjustments to be applied in their domestic capacity. There are currently 193 Member States in the United Nations.[6] Each member has a seat in the UN General Assembly. At the present 123 States joined the membership of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.[7] Afghanistan for instance, is part of both regimes of the UN and the Rome Statute as well as the Republic of Korea; 34 African States are parties to the Rome Statute as well as 18 Asian States; 18 are from Eastern Europe, 27 from Latin America and Caribbean States, and 25 are from Western European and other States. Libya, Bahrain, Egypt, Yemen, Iran, Saudi Arabia, Somalia and other States of the Arab League including some North African States such as Morocco and Algeria, are part of the UN system but not parties to the Rome Statute. Palestine struggles to become a party of both systems but its sensitive statehood issue still waits for solution. Israel is also not a State party to the Rome Statute nor is China, Russia and the US, as permanent members of the UN Security Council. The current practice in the humanitarian escalations of *last resort* in the maintenance of peace and security, the absence of law enforcement after the Court's judicial outcomes, and the gaps in civilian protection duties represent the main challenges in the governance of complementary global regimes.

As we know, the Sub-Saharan African situations are characterized by the recent formation of nation-states in the post-colonial phase between serious shortcomings of domestic systems dealing with ethnic and religious conflicts, gender crimes, corruption, resource exploitation and State's failure investigating and prosecuting serious breaches of international humanitarian law. Dangerous political transitions are characterized by one characteristic: the presence of warlords and criminal regimes profiting and abusing of the weakness of communities to express their political choice in a democratic context. The common issue characterizing such situations is the absence of

6 The Republic of South Sudan formally seceded from Sudan on 9 July 2011 as a result of an internationally monitored referendum held in January 2011, and was admitted as a new Member State by the United Nations General Assembly on 14 July 2011.

7 See for updates the chronological list of States Parties with the membership of Palestine recorded on 02 January 2015, accessible at: http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx

the nation-state securing basic rights and the protection of individuals. Some of the national regimes in place prioritize militarization and autocracy in their own domestic governance systems, while political transitions are in place and criminality is the main threat for civilians struggling for democratic governance and the respect of their fundamental individual rights. The question is simple: how are different situations of war and crime governed by complementary global regimes and which are the current expectations deriving from their complementary character?

Targeted sanctions centralize the individual responsibilities during sensitive political transitions, all of them characterized by severe violations of international humanitarian law. With regard to the responses of the international community fighting against war and crime we have seen that the escalation of the situation in Libya delayed the attention required by the violence spreading in Ivory Coast, including Kenya, Uganda, Central African Republic, Democratic Republic of Congo and Mali, particularly during the ectremely violent political transition in these countries. The commission of serious crimes spreads at regional scale. The option of international diplomacy by the United Nations, the US, France and the European Union for instance, represented a severe test to avoid that Ivory Coast would be dragged back into a more violent civil war as the consequence of the post-election violence. The so-called Security Council 'targeted measures' pressed the President Laurent Gbagbo to end months of post-election violence and finally transfer power to his rival Alassane Ouattara who won the presidential election earlier. Laurent Gbagbo had refused to step down even though the United Nations helped organise earlier the election and recognized the political victory of Alassane Ouattara. In the end, a military operation of the UN pressured by France became part of a neutralization campaign against heavy weapons that Gbagbo used against the civilian population. The most serious crimes, including alleged widespread sexual violence, were committed in 2002-2005. The International Criminal Court has jurisdiction over the situation in Ivory Coast by virtue of an Article 12(3) declaration, submitted by the Ivorian government on 1 October 2003. The country accepted the jurisdiction of the Court as of 19 September 2002 and became a State Party to the Rome Statute in 2013.[8]

8 See Statement of the Office of the Prosecutor, 6 April 2011, *Widespread or systematic killings in Côte d'Ivoire may trigger OTP investigation*, accessible at: http://www.icc-cpi.int/nr/exeres/2386f5cb-b2a5-45dc-b66f-17e762f77b1f.htm

The former president Gbagbo allegedly bears individual criminal responsibility, as indirect co-perpetrator, for four counts of crimes against humanity: *a)* murder, *b)* rape and other sexual violence, *c)* persecution and *d)* other inhuman acts, allegedly committed in the context of post-electoral violence in the territory of Ivory Coast between 16 December 2010 and 12 April 2011.[9] Currently, the post-election crisis seems to be over, but the struggles remain: reconciliation and reconstruction, including the restoration of security sectors and basic governance systems. The situation and the violence characterizing the political transition of this country seems to be similar to the one occurred in Kenya during and after the general elections,[10] where the security sectors including a reliable judicial system collapsed, and will surely need the support of international governance institutions in accordance with the findings of the accountability system falling under the Rome Statute. When Kenya was preparing itself for the elections in 2007 the State completely failed its own national reform and the justice agenda initiated years earlier ended in the disputed presidential elections. The violence and chaos following the 2007 elections led to the displacement of more than 600,000 people, the deaths of more than 1,200 citizens, the cruel destruction of property and ethnic polarization that is unprecedented in Kenyan history. This paved the way for the negotiations led by a team of eminent African personalities and chaired by Kofi Annan around the *Four Agenda Items*, which negotiations resulted in the Kenya National Dialogue and Reconstruction Agreement to which the government bound itself to implement.[11] The willingness and ability to deal with the post-electoral violence of Kenya were soon seriously compromised.

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9 According to the sources quoted by the ICC prosecution in the application to the Judges to open an investigation in Ivory Coast, at least 3000 persons were killed, 72 persons disappeared and 520 persons were subject to arbitrary arrest and detentions during the post election violence. There are also over 100 reported cases of rape, while the number of unreported incidents is believed to be considerably higher. See ICC-02/11, *Situation in the Republic of Côte d'Ivoire* in the pre-trial phase; see also ICC-02/11-3, 23 June 2011, *Request for authorization of an investigation pursuant to Article 15,* accessible at: http://www.icc-cpi.int/iccdocs/doc/doc1097345.pdf With regard to Kenya on 30 August 2011, the Appeals Chamber of the ICC confirmed Pre-Trial Chamber II's decisions of 30 May 2011 on the admissibility of the cases *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and dismissed the appeals filed by the Government of Kenya. See ICC-01/09-02/11 OA, 30 August 2011, accessible at: http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf

10 See Kenya background information accessible at: http://www.icc-cpi.int/NR/rdonlyres/26D853E3-83A6-45F1-BEE9-8B64E3723C55/0/BackgroundNoteKenyaJanuary2012.pdf

11 The Kenya Human Rights Commission (KHRC), The Kenyan Section of the International Commission of Jurists (ICJ-K) and International Centre for Policy and Conflict (ICPC) presented in 2010 the *Transitional Justice in Kenya: A Toolkit for Training and Engagement* which is both an information source on transitional justice, as well as a training manual for engagement with the on-going TJ processes in Kenya that were restarted in the aftermath of the 2007/8 post-election violence.

The proposals by the commission of inquiry into the post-election violence (CIPEV, or so called Waki Commission) establishing a local tribunal with an alternative for pursuing the Court to investigate and try those responsible for the post-election violence were not feasible, considering the findings of the Court to end the impunity regime. The judicial proceedings are currently held in The Hague.[12] In Kenya and Ivory Coast the Court would settle down the limits and main responsibility of national sovereignty prosecuting violence against civilians during political transitions. There is, however, a long way ahead to undermine the limits between statehood, sovereignty and international governance. The problem is to strengthen the global support necessary for such determinations, upholding the importance of the rule of law to the volatile peace processes influencing complementary actions for peace and stability. Besides, the political threat to the Court in the Africa region started because it was simply doing its job. It charged Kenya's Deputy President for killing people who assembled against him during an election, and Sudan's President for murdering women and children in Darfur. Kenya and Sudan are lobbying in the AU to pull out the Court and destroy its chance for success. But in Darfur, DRC, Uganda, Ivory Coast, Kenya and lately in Mali, the Court plays a key role in bringing hope to those terrified by the armies, militias and warlords that have waged war against innocent civilians. The main argument of some leaders with a guilty conscience and blood-dirty hands is that the Court is a Western witch-hunt as most of the investigations focus on Africa. This is not the truth. The Court is an institution created by many African countries, 5 of the Court's 18 judges are Africans, and the chief prosecutor is also African, including the president of the Assembly of the States Parties.[13] The Court represents a light in the darkness of war and crime in Africa and everywhere. It cannot be allowed to end. The African drama of serious attempts to the dignity of civilian lives is not the only concern. Unfortunately, its involvement in other regions is also somewhat compromised by political standpoints, by the limits of its jurisdiction and by the lack of global support.

12 The Second Vice President of the International Criminal Court (ICC) has informed the top leadership of the African Union (AU) that the Court can only consider suspending the Kenya cases before it if an application is made to the Court. See T. Maliti, "ICC asks AU to address concerns on Kenya cases through legal channels', *ICC Kenya Monitor*, 20 September 2013, accessible at: http://www.icckenya.org On 19 September 2014, Trial Chamber V(b) vacated the trial commencement date in the case *The Prosecutor v. Uhuru Muigai Kenyatta*, which had been provisionally scheduled for 7 October 2014. On 3 December 2014, ICC Trial Chamber V(b) rejected the Prosecution's request for further adjournment and directed the Prosecution to indicate either its withdrawal of charges or readiness to proceed to trial. Subsequently, on 5 December 2014, the Prosecutor filed a notice to withdraw charges against Mr. Kenyatta.

13 See ICC-ASP-20141002-PR1047, *Minister of Justice of Senegal, H.E. Mr. Sidiki Kaba, endorsed for the position of President of the Assembly, meets with States Parties in New York*, Press Release: 02/10/2014.

What we currently see in other parts of the globe is that the autocracy of regimes in the Middle East twisted revolutions in some of them, or civil wars in others, after 'peaceful' protests of their citizens. In Libya, according to reliable sources, the situation had since 2011 the typical grounds of mass atrocity crimes including the risk of a political transition posing serious global threats to the peace and security in the region. The UN General Assembly resolution of 1 March 2011 unanimously suspending Libya's membership from the United Nations Human Rights Council (UNHRC) was the first sign of the position taken by the international community. According to the UN and the ICC sources, the actions taken by the regime in Libya were clear violations of all norms governing international behaviour and serious transgressions of human rights and international humanitarian law.[14] Libya holds important natural resources as well as weapons and military arsenals acquired in the course of the years by the traffic in the Mediterranean, and which reached the hands of the rebel groups and a tyrant that for too long was tolerated by the world community for several reasons, one of them being the mitigation of North African migration in the South of Europe and another interest of western multinationals for its natural resources. After the Darfur referral of the situation in the Sudan by the Security Council to the Court, the situation in the *Libyan Arab Jamahiriya* followed. Therefore, let us further examine in the next paragraph the humanitarian escalations occurred between international governance institutions and the referral activities so-called of *last resort* by the Security Council to the Court.

4.1.3 The first generation of referrals from the Security Council: Sudan and Libya

In the past and from a legalistic approach, the Security Council acted as a legislator even if the UN Charter did not give such powers to act in that way. The reform of the collective security system did not succeed.[15] The Security Council addressed situations through legislative resolutions that, as a matter of principle, should have been regulated by international treaties. With the Rome Statute it does not seem that the distortion of constitutionalism dealing with peace, justice and security is definitely solved, but it becomes more complex. When the Court received the referral from the Security Council and the extension of jurisdiction in the Sudan, a non-State party to the

14 See ICC-01/11 Situation in the Libyan Arab Jamahiriya, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 16 May 2011, accessible at: http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf See also I. Vetrhus, 'Gaddafi: Game Over?', *New Africa Analysis*, 1st of August 2011, accessible at: http://newafricaanalysis.co.uk/index.php/2011/08/gaddafigame-over/ See also All Africa Reports, *Libya: Gaddafi Killed*, 20 October 2011, accessible at: http://allafrica.com/stories/201110201410.html

15 For the discussions and contributions of effective multilateralism and the importance of policy formulation and institutional reforms see N. Pirozzi, N. Ronzitti, 'The EU and the Reform of the UN Security Council: Toward a New Regionalism?', in *IAI Working Papers*, 12-12, May 2011, at 9, accessible at: http://www.iai.it/pdf/DocIAI/iaiwp1112.pdf

Rome Statute, it should have been defined a clear strategy of support from the Security Council during and after the Court's judicial activities.[16] In response, the government of Sudan, supported by Russia, China, Libya, the African Union (AU), and the League of Arab States, argued that the Security Council should exercise its authority under Article 16 to request the suspension of the proceedings in Darfur, claiming that the issuance of an arrest warrant against President al-Bashir would undermine ongoing efforts to find a peaceful resolution of the conflict in Darfur. Soon it became very clear that the Court would not receive any space in the maintenance of peace and security with law enforcement measures. On the contrary, there is still uncertainty of support in the referral activity coming from the Security Council. The risk is to undermine the credibility of global regimes of complementary character governing war and crime.

Although Article 16 permits the Security Council to act in exceptional circumstances, the situation in Darfur did not present such exception for the Security Council to exercise its deferral power. All promises by al-Bashir of ceasefires and peace negotiations had been broken. Therefore, the deferral of the proceedings against al-Bashir could not be seen as a means to *maintain* peace and Article 16 of the Rome Statute was definitely inapplicable. The same approach of the Security Council is repeated in Resolution 1970 (2011) referring the situation of Libya to the Court. The Security Council demands an end to the violence and decides to refer the situation to the Court. This time the resolution has been adopted unanimously under Chapter VII of the UN Charter (Article 41). Although the situation has the main characteristic of an *intra*-state conflict, the Security Council used the legal provisions of Chapter VII emphasizing the necessity of civilian protection duties. It needs to be noted that in paragraph 8 of the Resolution 1970 (2011) addressing the referral to the Court, the Security Council '*recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily'. Such an approach is of course very far from a democratic and supportive interaction strategy, if we only consider the complementary nature of the emerging regime of international criminal justice in the context of peace and security in the region. This view deserves some clarification through a quick interpretation of the international military response authorized by the Security Council in Libya.

16 See UN doc. S/RES/1593 (2005).

4.1.4 The international military engagement in Libya

The military intervention in Libya had partly the same political motivations of the situations in Kosovo and ex-Yugoslavia at the time of Slobodan Milošević, or by Saddam Hussein in Iraq. Apart from preventing mass atrocities they meant to destabilize regimes no longer desired by the political circles characterizing international relations. This time in particular in Libya, the intervention was characterized by a controversial mandate by the Security Council oriented on civilian protection duties as expressed in the Resolution 1973 (2011) with a voting record of 10-5 and recalling the Resolution 1970 (2011). These modalities resulted already to be compromised in the Sudan and in the Democratic Republic of Congo as will be proven in the third part of this work.

The Libyan territory is characterized by a larger area not easily accessible on the ground similar to Afghanistan and Iraq. The risk is that the same crimes under international humanitarian law are common to all situations in the Middle East, where unarmed citizens protest against autocratic and criminal domestic regimes. The so-called *Arab Spring* and its hot-blooded situations in the quest of democracy are only at their initial stage. Several violations under international law characterized the civilian protests in Yemen, Bahrain and Syria. The domino effect of political, economic, and humanitarian crisis proceeds in the main region, with Israel being in the middle of them and ready to defend its borders with any (military) means. A couple of years ago, thousands of Palestinians passed from Syria and Lebanon reaching the Gaza Strip and the West Bank toward Israeli border positions, hurling rocks and surging across one frontier before the Israeli army opened fire, killing and injuring hundreds of them. On the top of that, the tensions and the diplomatic fracture in the region become more and more visible in particular with Iran, and at the borders between Syria and Turkey, with the NATO debating again about military action.

The question is whether the selectivity and double standards of referrals from the Security Council to the Court under Chapter VII of the UN Charter, would not only transfer jurisdiction to the complementary regime of the Rome Statute, but also cooperation and resources, including accountability of potentially unlawful actions under international humanitarian law. The political responsibility of the Security Council has a local and regional impact with the League of Arab States (or Arab League) as the important interlocutor in peace and security matters in the region, including the African Union. It is unfortunate to note that such political impact does not profit the regional support to the Rome Statute regime. Another issue was also to verify the standards of humanitarian support to migrants fleeing from the Libyan coast to Italy by the NATO, which had obligations on civilians according to the responsibility to protect (RtoP) including other international obligations. The Council of Europe, which is not an EU institution,

but charged with monitoring compliance with the European Convention on Human Rights within the 49 Member States, conducted an investigation to find out why so many people died in 2011 in the Mediterranean despite monitored more closely than ever before.[17]

When intervening in the situation in Libya the priority was given to the military operations and the delusion of quick fix under the flag of humanitarian global solidarity. For many observers entering a war in Libya, while the international community was still involved in one in Afghanistan, and while Iraq appeared far from stable, was a very bad choice. After referring the situation in Darfur, Sudan (which situation receives assessment in the case study), the UN Security Council voted unanimously Resolution 1970 (2011) to impose sanctions against the Libyan regime, slapping the country with an arms embargo and freezing the assets of its leaders, while referring the on-going violent repression of civilian protesters to the Court.[18] With the Resolution 1973 (2011) the Security Council approved the no-fly zone and the civilian protection mandate trying to involve the Arab League in 'all necessary measures' against the Libyan regime. The military command of the operations in Libya was similar to the mission in Afghanistan (ISAF – International Security Assistance Force) enlarged to the non-parties of the NATO but still part of the military coalition, as for instance Qatar and the Arab Emirates. In any case, the absence of any Arab involvement during the first air strikes on Libyan air defence systems underlined the Western nature of the mission. It was very important for the public opinion in the Arab world to know that this was not simply the West acting against the violent regime in Libya. But was this really the case? Furthermore, it needs to be noted that for the first time Europe would take the lead of the NATO military operations in such explosive area albeit US air support was indispensable.

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17 During the month of August 2011 the Italian coastguards have found death bodies of men on a boat crowded with refugees fleeing Libya, see for the reports BBC, 1st of August, article accessible at: http://www.bbc.co.uk/news/world-europe-14363905 See also 'NATO does not respond to humanitarian SOS: verifications required by the Italian Ministry of Foreign Affairs', 4 of August, accessible at: *http://palermo.repubblica.it/cronaca/2011/08/04/news/nave_nato_non_risponde_a_sos_umanitario_la_lega_non_possono_solo_bombardare-20039567/?ref=HREC1-1* See also the recent jurisprudence of the ECHR, *Hirsi and others v. Italy,* which judgment unambiguously upholds the right of persons intercepted at sea not to be pushed back and to request asylum. For the legal details see the Submission by the Office of the United Nations High Commissioner for Refugees in this case, March 2010, available at: http://www.unhcr.org/refworld/docid/4b97778d2.html See Council of Europe report, *Lives lost in the Mediterranean Sea: who is responsible?* 29 March 2012, accessible at: http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf

18 See ICC-CPI-20110504-PR659, 4 May 2011, *First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011).* See also *Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011),* the full version is accessible at: http://www.icc-cpi.int/NR/exeres/DCBD3E2C-C592-4FB8-B7CB-E18E67F692D1.htm

4.1.5 The absence of civilian protection measures in Libya and Syria

A quick interpretation of the Resolution 1973 (2011) indicates that the use of military force authorized under Chapter VII of the UN Charter results from the mandate of the responsibility to protect civilians (RtoP). Does then the RtoP also means to take sides during armed conflict, with the rebel groups deserving military support even prior a civil war would take place in a particular country? France was behind this military strategy with other European States ready to provide weapons to the rebel groups. The military operations in Libya engaged initially France, the UK, the US and Canada, with Italy, Spain and Qatar (and other States) possibly joining at a later stage. With this military engagement the RtoP becomes controversial as in the Sudan, where the partial mandate of the Security Council was swapped in the hands of the African Union and then back to the UN operations in the field. The Arab League immediately took political distance, as some of its leaders feared the same treatment reserved to the Libyan regime. The same political reserve was previously taken by the African Union after the indictments against the Sudanese leaders. The nature of the resolutions in Libya, being quite different from the language of peace and security maintenance in the region, authorize to protect civilians prioritizing the military operations, which again raises issues of proportionality, double standards and a willingness of regime change under the premises of dubious and hassled civilian protection measures.

It needs to be also noted that with the enforcement of the no-fly zone in Libya the European countries engaged in the civil war were likely to confront some of their own weapons previously purchased to the Libyan regime. The NATO air strikes had the scope to quickly destroy the major weapons of the Libyan regime. The situation is very similar to what happened in the case of Kuwait and Iraq in 1990. The Resolution 1973 (2011) was adopted in the Security Council by a vote of 10 in favour, to none against, with 5 abstentions (Brazil, China, Germany, India, Russian Federation) with the mandate to protect civilians and civilian populated areas. The main concern about the political preferences by the permanent members of the Security Council is once more confirmed if we look at the positions of China in regard to Sudan, and with Russia blocking global action for the humanitarian intervention in Syria.[19]

19 China, which has major oil interests in the Sudan did not arrest Sudanese President Omar al-Bashir during his visit to Beijing on 29 June 2011. See S. Ho, 'China Pledges Lasting Friendship with Sudan', in *Voice of America*, 29 June 2011, accessible at: http://www.voanews.com/english/news/africa/China-Pledges-Lasting-Friendship-with-Sudan-124701259.html

There have been obvious negative consequences creating the precedent of militarization in Libya. The intervention force in Libya was not allowed to occupy the territories and required several stages of interaction between the UN operations on the ground and the International Criminal Court, in case a reliable judicial system would not be in place, and also to protect relocate and rehabilitate victims and witnesses of international crimes, including the enforcement of judicial decisions against the individuals most responsible of such crimes. In any case, the fact that the rebels in the country received weapons outside the arms embargo confirmed the willingness of regime change in the country. Hopefully, the domestic system established by the National Transitional Council (NTC) will receive other forms of assistance oriented to a civil formation of a democratic State and its constitution. After the arrest and killing of former President Gaddafi, the National Transitional Council, which by then controls the whole territory of Libya, declared the country liberated. The NTC has issued a constitutional declaration which sets out a plan for a transitional process that would lead to the drafting of a new constitution and the holding of legislative and presidential elections.[20]

Despite the several critics of *politicization* the Court remained out of the way from the political dynamics of international relations and their compromise. After all, the *bad guy* (Gaddafi) who was left for more than a generation at his place by the international community had been neutralized in a way absolutely not comparable with court's room or any judicial system. A simple question arises: if in Libya the devastating attacks on civilians required the 'protective' mandate by the Security Council, why the attacks on civilians in the Gaza Strip during the Israeli operation Cast Lead have been ignored? After all, as Schabas emphasized on his blog "the Gaza war occurred in 2008 after the R2P norm was taking shape, the conflict resulted in between 1,166 and 1,417 Palestinian and 13 Israeli deaths, and was not far away from where the Libyan regime was currently executing his own people".[21] The same political controversy would also apply to the repressive and violent regime on civilians in Syria, which in my opinion represents the 'Pandora's box' compromising peace and security in the region, if we only consider the vicinity to the regimes in Iran and Lebanon and with Israel in the middle of them. The risk is that the Syrian authorities would use the support from Iran to repress civilians with the same brutal methods previously used by the Iranian regime. It needs to be noted that the Syrian security forces sent troops to the south of the country firing on unarmed protesters. The rebels claim

20 For an extensive overview of the fragmented security landscape in Libya see International Crisis Group, *Holding Libya Together: Security Challenges after Kadhafi*, in Middle East/North Africa Report N°115 – 14 December 2011.

21 V. Tsilonis, "Interview with Professor William Schabas. International Protection of Human Rights and Politics: an Inescapable Reality", *Intellectum* 7, (2010), at 46–61. On 11 August 2014, the United Nations Human Rights Council appointed William Schabas to chair the Gaza commission of inquiry, see more at: http://www.un.org/apps/news/story.asp?NewsID=48459#.VC7LOfmSxws

that thousands of civilians have already died since the initial clashes with the troops in the South and in the North of the country. This stage seems to be only the beginning of extreme violence on civilians escaping in the south of Turkey and Lebanon, compromising the fragile diplomatic relations between Turkey, Israel, Syria and Lebanon.[22] The Syrian authorities on their side claim that the troops have been sent at the request of civilian residents with the scope to protect them against armed criminal groups. According to human rights organizations this undermines further the truth of severe violations of international humanitarian law committed in the country. The statistics of the brutal attacks against civilians confirm the trend that Syria is taking the same devastating large scale proportions of political violence as the situation in Kosovo.[23]

The current disturbing information disclosed by reliable sources operating on the ground in Syria is that the government shoots, poison, and gas, its own people. In the meanwhile, the Security Council failed to agree on a resolution. It is clear that there is international division over condemning the violence in Syria. A draft proposal prepared by France, UK, Northern Ireland, Germany and Portugal was opposed by several States within the 15 members of the Security Council.[24] Russia and China are using their veto powers opposing a resolution falling under the maintenance of peace and security in the region including a referral to the International Criminal Court.[25] The US requests the UN Human Rights Council to start an independent investigation. In the speech-making of the OHCHR, the former High Commissioner for Human Rights Navi Pillay emphasizes that "the Syrian government has an international legal obligation to protect peaceful demonstrators and the right to peaceful protest. The first step is to immediately halt the use of violence, then to conduct a full and independent investigation into the killings, including

22 See M. Chulov, 'Syrian refugees in Turkey: People see the regime is lying. It is falling apart', *The Guardian*, 9 June 2011, accessible at: http://www.guardian.co.uk/world/2011/jun/09/syria-turkey-refugees-denounce-regime Early this year the NATO members convened in Brussels to consider a response to the cross border attack by Syria on Turkey as a member of the organization with France offering the military lead. After the mortar rounds fired from Syria the NATO discusses the military stra tegy. The United Nations Secretary-General voiced growing concern over the risk that the confrontation might have on the regional peace. See the article 'Nato will defend Turkey from Syria attacks', *The Telegraph*, 12 November 2012, accessible at: http://www.telegraph.co.uk/news/worldnews/europe/turkey/9672199/Nato-will-defend-Turkey-from-Syria-attacks.html

23 H. Guindy, 'Mass Atrocities Across Syria', in *Al-Ahram Weekly On-line,* 2-8 February 2012, accessible at: http://weekly.ahram.org.eg/2012/1083/re2.htm

24 See UN doc. S/2011/612 (Draft resolution not approved).

25 Despite repeated appeals by senior United Nations officials for accountability for crimes being committed in Syria, the Security Council was unable to adopt a resolution that would have referred the situation in the war-torn nation to the ICC, due to vetoes by permanent members Russia and China. See UN News Centre, *Russia, China block Security Council referral of Syria to International Criminal Court*, 22 May 2014, accessible at: http://www.un.org/apps/news/story.asp?NewsID=47860#.VOxSp3zF_RA

the alleged killing of military and security officers, and to bring the perpetrators to justice".[26] Simple questions arise: why the Security Council did not use the remedy of international criminal justice falling under the Rome Statute referring the situation of Syria to the International Criminal Court?[27] And independently from the *last resort* option of international criminal justice, where have been left the *solidaristic* civilian protection measures falling under the RtoP? In order to provide a comprehensive response the next section clarifies further the concerns characterizing the difficult reach of universality in its *dark* side, including some of the challenges and opportunities.

4.2 The globalist approaches of governance systems

Section Outline

The concerns regarding the transition of global security systems, the legal and political responsibilities of their governance, and the unresolved statehood issues denote the globalist approaches of governance dealing with the accountabilities of States and individuals at the same extent, including the accountabilities of non-state actors in situations of war and crime. Even if the criteria to isolate violent and criminal regimes by the international community seem to be the current political trend, reliable models of governance are still waiting to be defined. It needs to be noted that the globalist approaches can have at least two different and opposing meanings. One meaning refers to the policy formulations placing the interests of the world community above those of single nation-states towards a constitution of the world community. Another view perceives the entire world community as a proper sphere for one powerful nation or a group of leading nations to project political influence globally. In both cases there seem to be any agreement about alternative theories that could make sense of systemic changes in the global legal and political order. In the policy formulation and the creation of normative frameworks deriving from it, the advocates of constitutionalism or pluralism still do not find common grounds. Such dichotomy is easily detectable when we look at the empowerment and institutional design of

26 The OHCHR provides a forum for identifying, highlighting and developing responses to contemporary human rights challenges, and act as the principal focal point of human rights research, education, public information, and advocacy activities in the United Nations system. See OHCHR Media Center, *Pillay urges Syria to halt its assault on its own people*, 9 June 2011, accessible at http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true

27 After months of deadlock, the Security Council finally responded to the escalating violence in Syria which escalated with the use of force against civilians in the city of Hama, 130 miles (210 kilometers) north of the capital Damascus, condemning President Bashar Assad's forces for attacking civilians and committing human rights violations. See UN News and Media Division, SC/10352, *Security Council, in Statement, Condemns Syrian Authorities for Widespread Violations of Human Rights, Use of Force Against Civilians*, 3 August 2011, accessible at: http://www.un.org/News/Press/docs/2011/sc10352.doc.htm

global regimes and the international governance institutions deriving from them, which complementary nature is still not applied in the practice. This section recalls some of the lessons deriving from the past, before the transition of global security systems would receive further analysis and debate in accordance with the human security doctrine and the quest of *complementarity* already approached in the first part of this study.

The fact that there is not a world government but rather multilateral settings to debate issues and determine collective course of actions, does not mean that the international community is not responsible to improve democratic legitimacy of international governance institutions. On the contrary, such legitimacy depends on democratization processes balancing powers between complementary public authorities, while also defining policies and legal responsibilities. In order to explore the current standpoint of such democratic processes the controversial long-running debates *a)* on peace and justice priorities; *b)* on the law enforcement and cooperation dilemmas; *c)* on the human rights defence and implementation of human security measures; *d)* on the preservation of the rule of law at domestic, regional and global levels; *e)* on the political determinations to implement democratic interactions in conflict and post-conflict situations where complementary global actors are currently involved, require all of them appropriate solutions. In other words, the nature of the responsibilities of cooperation those complementary governance institutions might share in the middle and long terms, require further debate in international political *fora*, on the nature, identification, prevention and prosecution of mass atrocity crimes. The expectation is that from the debate in the General Assembly and in the Security Council and other stakeholders, such as the Assembly of the States Parties to the Rome Statute, a political *road map* would be translated into action, not only limited to the support of pluralistic frameworks based on cooperation, but implementing and integrating a constitution of the world community able to unify global efforts and values. After all, the fight against impunity and accountability for the most serious crimes of international concern has been strengthened throughout the Rome Statute, in ad *hoc* and *mixed* tribunals, as well as specialized chambers in national tribunals. In this regard, the General Assembly and the Security Council should engage not only in situation-related forms of commitment but as mandatory obligation for all UN member States, thus for both categories of States Parties and non-Parties to the Rome Statute. After all, the call for such political *fora* should promote the global engagement in the fight against impunity and also draw attention to the full range of justice and reconciliation mechanisms, including truth and reconciliation commissions, national reparation programs, guarantees of non-recurrence, while promoting institutional reforms, rule of law and security sector reforms in domestic jurisdictions. In other words, the international community and its tools of governance should be prepared to adopt appropriate measures aimed at those who violate international humanitarian law and human rights law.

4.2.1 The global concerns

In my opinion, and considering the chronology of the current humanitarian escalations between political and judicial international mandates, the first argument is the lack of preventing mass atrocity crimes towards timely intervention, as well as finding an integrated approach of governance. To clarify the concerns the following may be helpful. What we currently see is that national constitutions and domestic governance institutions are collapsing even in modern democracies such as in Greece, Italy, Spain and Portugal and not exclusively in the so defined 'failed' States. The problem is that such phenomena compromise much deeper the national legislations and the separation of powers of public authorities at local, regional and international levels centralizing the fundamental rights of individuals in constitutional frameworks. We all know that the preservation of universal values depends on the ways they are enforced and governed. The potential that multilateral premises would further contribute to the implementation of a world constitution according to the challenges of the time deserves discussions. A political strategy of interactions between law enforcement institutions is still pending, while there are discrepancies between domestic, regional and international responsibilities. The global solidarity, and the moral advent of humanitarianism to govern issues such as the humanitarian interventions under the flag of civilian protection duties (R2P or RtoP), mass atrocity crimes, terrorism, drug trafficking, migration and refugees, proliferation of weapons of mass destruction, are characterized by serious political deadlocks. Besides, the lack of a global strategy challenging the traditional concept of international security compromised in several occasions human rights and the rule of law (e.g. the wide scale conflict during the Iraq War encompassing a military campaign by a multinational force led by troops from the United States and the United Kingdom, or the policy formulation after the terrorist attacks launched by the Islamist terrorist group al-Qaeda upon the United States in New York City and the Washington DC areas). The governance of humanitarian crisis in conflict and post-conflict situations is characterized by serious controversy. If on one side States and global actors refer to the international responsibility to intervene in case domestic systems collapse and are not 'able' or 'unwilling' to protect civilians, on the other side an architecture of such governance represents a problematic 'paradigm in the making'.

There are no doubts that the emerging regime of international criminal justice gives authority to the two bodies of international law dealing with the treatment of individuals, such as human rights and international humanitarian law. We can easily acknowledge that international law has evolved in its use and importance due to the increase in armed conflict and mass atrocity crimes, but it still struggles to regulate criminal behaviors of States and non-state actors, including the civilian protection measures in conflict zones. Further progress of the rule of law seems to depend on the devel-

opment of effective and complementary treaty regimes centralizing fundamental individual rights. Previous assessments of the international legal order suggest that the solutions depend on the international governance institutions, which deserve further constitutional parameters by the political actors enforcing them *in* and *out* their own governance systems. In the current system of international governance, however, the problem of the absence of a supranational system and *trias politica* in international relations is not solved by the existence of complementary international governance institutions. The lacuna of *checks and balances* systems between international public authorities dealing with peace, justice and security is not solved and still remains. The paradigm shift of complementary global regimes is that they try to find possible solutions through cooperation but an interaction strategy between them is still to be found. Their respective relationship vis-à-vis the States receives priority with the consequence of tensions between peace and justice mandates, which also derive from the absence of a well-defined interaction strategy between international regimes and emerging sub-regimes. The consequence is well known in the gaps of civilian protection measures either in the context of peace processes and justice mandates in conflict and post-conflict situations and the difficult task to provide sustainable peace.

4.2.2 The global responsibilities

The multilateral frameworks under the UN premises of preventive diplomacy, crisis prevention, early warning and accountability are absolutely considered an important part of the interaction strategy advocated in this work. This study promotes the predictability of assessments and legal definition of collective or shared responsibilities between international regimes which will need further legal research. This work focuses on the complementary role of international regimes fostering peace diplomacy, without compromising judicial proceedings of legal institutions such as the International Criminal Court. It denotes the importance of justice, intended as the restoration of the rule of law considered as centralizing individual rights during humanitarian crisis in conflict zones. This study emphasizes the necessity of joint solutions promoting the development of 'accountable' and 'democratic' governance, which is critical to building the capacity to manage conflicts, violence and crime in conflict and post-conflict situations. There seem to be new opportunities after the failure of international security systems and the shortcomings in the fight against the impunity of mass atrocity crimes in Bosnia, Rwanda, Somalia and Angola. Such opportunities require reliable interaction strategies. In Srebrenica for instance, the UN peacekeepers were the witnesses of massive ethnic cleansing. They had to leave the truth of the Bosnian *enclave* behind. The events included the killing of thousands of Bosnian Muslims as well as the mass expulsion of millions of them, in and around the town of Srebrenica in Bosnia and Herzegovina. In July 1995 the United Nations Protection Force (UNPROFOR), represented on the ground

by a few hundreds of Dutch peacekeepers, failed to prevent the town's capture by the Serbian army and the subsequent massacre. The protection mandate by the UN did not work, the alliances did not respond, the configuration of the international mandate did not have solutions to the Srebrenica massacre, which became the largest mass murder in Europe since WWII.[28] These serious humanitarian crimes of common concern were committed by the units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladić, who has evaded arrest by the ICTY and remained at large for 16 years just remaining in Serbia under an assumed name. His capture was considered as one of the pre-conditions for Serbia to join the European Union. According to the lessons learnt from the past in Rwanda, Sierra Leone and in the Balkans, an assessment is required on the ways the international community would 'prevent', 'react', and 'rebuild' conflict and post-conflict situations affected by mass atrocity crimes in multiple conflict zones enforcing appropriately complementary governance institutions. The question is whether we learn enough from the past experience deepening our shared responsibilities.

In general terms, the international governance institutions decide on cooperation agreements and arrangements providing some structure to their mutual interests. Notwithstanding this field of law is mostly underestimated in the advancement of a world constitution, it gives at least some weight to the definition of complementary global regimes and their transition. The ideal would be to merge constitutional provisions of a humanitarian character dealt by the Rome Statute in the UN Charter, perhaps combined with the amendments of the UN Charter advocated for years. We are all aware that this depends on several factors, the most important of which would be the universal ratification of the Rome Statute. In any case, the resource and knowledge sharing between the United Nations and the Rome Statute institutions remains an important *conditio sine qua non* of good governance, but such fundamental step is only at its initial stage and still waiting for visible engagements. With the Rome Statute, the emerging regime operating in the field of *retributive* and *restitutive* international criminal justice would be based on the cooperation with relevant partners, such as the United Nations institutions and its specialized agencies. Such cooperation is still in the implementation phase and is not legally binding for the UN political institutions such as the Security Council. The practice indicates that the interaction between complementary global regimes depends on political processes enforcing international mandates on the ground, combined with jurisdictional triggering mechanisms in accordance with the treaty provisions.

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28 See S. Perkins, 'The Failure to Protect: Expanding the Scope of Command Responsibility to the United Nations at Srebrenica', 62 *University of Toronto Fac. L. Rev.* 193: 2004, accessible at: http://heinonline.org/HOL/Page?handle=hein.journals/utflr62&div=14&g_sent=1&collection=journals

The challenges occurring in the context of statehood, sovereignty and international governance deserve attention measuring how far complementary global regimes centralize individual rights, with the States and the criminal perpetrators being in the middle of them. Once judicial proceedings would find out about the truth there should not be any political approach able to neutralize it. Besides, only a judicial institution would be able to define the degree of inhumanity, or better say criminality, considering the range of crimes committed, while offering valid justifications for the 'right' of humanitarian intervention. And last but not least, this right should be appropriately used in civilian protection measures for the victims and witnesses of international crimes of common concern upholding the important *protective* aspect of international criminal justice.

4.2.3 The unresolved statehood issues

In the context of jurisdictional matters including the sensitive statehood issues and the pressure of referral activities from the UN to the Court, a valid controversial example is that the UN Human Rights Council (UNHRC) adopted a resolution (A/HRC/RES/22/25) as a follow-up to the report of the UN fact-finding mission on the Gaza conflict, which contains the recommendation to the UN General Assembly to submit the previous report on the human rights violations in the Gaza war to the UN Security Council for its consideration and appropriate action. The Human Rights Council explicitly recommends the referral of the situation in the Occupied Palestinian Territory to the International Criminal Court, pursuant to article 13(b) of the Rome Statute.[29] It also recommends that the General Assembly remain apprised of the matter until it is satisfied that appropriate action has been taken at the domestic or international level to ensure justice for the victims and accountability for the perpetrators, and also remain ready to consider whether additional action within its powers is required in the interests of justice.[30] The real matter waiting for solutions is still the issue of statehood of the Occupied Palestinian Territory and the admissibility of the violations occurred against civilians during the Gaza war. This confirms the unresolved issue by the UN legal and political institutions about the public international authority recognizing Palestine as a State, which seems unlikely that would be the

29 Article 13(b) of the Rome Statute. "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if…a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations…".

30 See UN doc. A/HRC/12/48 (2009), Report of the United Nations Independent Fact-Finding Mission on the Gaza Conflict. See also UN doc. A/HRC/16/72 (2011), Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk.

International Criminal Court and neither the United Nations.[31] The recognition of a new State or government is an act that only other States and governments may grant or withhold. It generally implies readiness and ability to assume diplomatic relations. The United Nations is neither a State nor a government, and therefore does not possess any authority to recognize either a State or a government.

On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Rome Statute, the Prosecutor, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, and as a matter of policy and practice, opens a preliminary examination of the situation at hand. Accordingly, on 16 January 2015, the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met. Specifically, under article 53(1) of the Rome Statute, the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice in making such determination.

Over 140 nations from the Middle East, Africa, Asia, Latin America and Europe have already endorsed the initiative of the UN recognition of the State of Palestine, but Israel's right-wing government and the US vehemently oppose it. Europe is still hesitant, but a massive public push brought them to vote for this momentum to end 40 years of military occupation. While the roots of the Israeli-Palestinian conflict are complex, most analysts agree that the best path to peace would be the creation of two States as also endorsed by the UN Security Council. However, repeated peace processes have been undermined by violence on both sides, extensive Israeli settlement-building in the West Bank, the humanitarian blockade on Gaza and Israeli strike on civilians, as well as rockets from Gaza on South Israel. The Israeli occupation has fragmented the territory for a Palestinian State and made daily life misarable for the Palestinian people. The UN, the World Bank and the IMF have all recently announced that Palestinians are ready to run an independent State, but confirm that the main constraint to success is the Israeli occupation. The US President has called for an end to settlement expansion and a return to the 1967 borders with mutually agreed land-swaps, but Israeli Prime Minister Netanyahu has furiously refused to cooperate.

31 For an overview of the military occupation and the limits of the Court's jurisdiction see M. Glasius, 'The ICC and the Gaza War: legal limits, symbolic politics', 28 March 2009, accessible at: http://www.opendemocracy.net/article/the-icc-and-the-gaza-war-legal-limits-symbolic-politics

The UN resolution to upgrade Palestine from its status as an observer *entity* to an observer *State* does not change the Palestinians lives on the ground. Most important, the UN resolution shapes the urgent need for the resumption and acceleration of negotiations within the Middle East peace process.[32] That remains the key according to both Israel and the Palestinian authority to a real two-state solution. As correctly point out by Stork "the argument that Palestine should forego the International Criminal Court because it would harm peace talks rings hollow when 20 years of talks have brought neither peace nor justice to victims of war crimes. People who want to end the lack of accountability in Palestine and deter future abuse should urge President Abbas to seek access to the ICC".[33]

The legal and political determinations of the UN Human Rights Council addressing issues in the legal framework of governance and referral activity between the UN institutions and the Court confirm the necessity to establish the complementary character of both global regimes preserving the rule of law and human rights. There are no doubts that complementary organizations, such as the UN Human Rights Council and the International Criminal Court, have to relate to each other in situations of serious breaches of human rights. Such complementary role is also at its initial stage and also in transition. It needs to be noted that the Human Rights Council is an inter-governmental body within the UN system made up of only 47 States responsible for strengthening the promotion and protection of human rights around the globe. As previously emphasized the Human Rights Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. For many, and particularly for the permanent members of the Security Council, it accommodates better if the complementary role of the Court to the UN would fall in the peace and security maintenance. But then, can we still simply assume that the UN Security Council is still the predominant authority dealing with serious human rights breaches in conflict and post-conflict situations? If yes, should it not be the case to provide resources to the emerging regime of international criminal justice established under the Rome Statute? This is a matter to be absolutely dealt with by the UN General Assembly and the outcome of it remains to be seen considering the needs for an emerging international regime to accomplish its universality.

32 See UN doc. General Assembly, Resolution A/RES/67/19 (2012), recorded vote of 138 for the recognition of observer State to 9 against, with 41 abstentions.

33 HRW, *Palestine: Go to International Criminal Court*, May 8 2014, accessible at: http://www.hrw.org/news/2014/05/08/palestine-go-international-criminal-court

4.3 The transition of global security systems

Section outline

This section further debates the transition of governance systems in the new order fostering human security and which surely need further accomplishments. The transition deserving attention regards the system of collective security and the nature of civilian protection measures when human security is seriously compromised. Another aspect refers to the policy definition of international threats in international crimes which would enhance the jurisdiction falling under the Rome Statute and its future extension. It needs to be noted that in the context of global order, international regimes simply deal with the governance without a government, depending on their provisions, policy formulation and the cooperation with their stakeholders and partners. The lasting struggle for the legal doctrine delineating domestic and international responsibilities in situations of war and crime brought some results but there is still a long way ahead. Further progress depends on the jurisprudence of legal institutions and by the determination to enforce the rule of law and the standards of human rights at domestic, regional and international levels. The dilemma is the governance of political transitions that are internal to collapsed nation-states and their failure vis-à-vis the security of individuals during civil wars. In many situations of war and crime, the engagement in military actions by States and global actors would appear legal but not fully legitimate, while promising unrealistic civilian protection duties during humanitarian interventions. The same concern is valid for the governance of conflicts between States, or *inter*-state conflicts, as in the case of the commission of the crime of aggression. Such governance also represents a controversial 'paradigm in the making' for complementary global regimes, considering the triggering mechanisms between the UN Security Council and the International Criminal Court respectively dealing with the accountability of States and individuals, and which received further postponement by the political forces responsible of their empowerment.

It needs to be noted that the term *supranational* has sometimes been used in an undefined sense as a substitute of international, transnational, or global decision-making. Both the UN and the Rome Statute institutions are to a large extent not *supranational*. The majority of the nation-states of the world community have dualist systems, meaning that they will only accept international obligations through the process of incorporation, as for instance,

by signing, ratifying and adopting international treaties and conventions.[34] In contemporary international regimes the intergovernmental decision-making still plays a prominent role centralizing individuals in conflict and post-conflict situations. The formulation of the global humanitarian policy and the legal frameworks deriving from it, deserve discussions to verify the meaning and the nature of the governance of complementary global regimes fostering human security, including the *status quo* of the idea of cosmopolitan democracy. The idea of cosmopolitan democracy has been advocated with reference to the reform of international organizations. This includes the implementation of the Rome Statute institutions about victims and witnesses protection, the institution of a directly elected world parliament or world assembly of governments, and more widely the democratization of international organizations such as the UN.[35] This section reflects on the possible transitions from collective security to human security towards appropriate interaction strategies balancing powers between complementary global regimes fostering peace and justice. The purpose is to stimulate the debate in order to find urgent consensus by the relevant decision-making embracing the transition and challenges of human security and the complementary responsibilities of global regimes. Appropriate reforms of working methods should be in line with a political *road map* visible in a defined strategy of interactions.[36]

4.3.1 What kind of civilian protection measures?

It is clear that the role of the UN and the regulation of collective security are in transition given the rise of *intra*-state conflicts since the end of WWII. The interventions of the world community in such conflicts require systemic changes and adjustments which appear to be partial when we look at the empowerment and interaction between complementary global regimes. Besides, collective security is more ambitious than the systems of alliance security or collective defense. It seeks to encompass the totality of States

34 For an overview of the various aspects of crimes against humanity, which unlike genocide and war crimes were never set out in a comprehensive international convention, including discussions on gender crimes, universal jurisdiction, the history of codification efforts, the responsibility to protect, ethnic cleansing, peace and justice dilemmas, amnesties and immunities, the jurisprudence of the *ad hoc* tribunals, the definition of crimes against humanity in customary international law, the definition of the International Criminal Court, the architecture of international criminal justice, modes of criminal participation, crimes against humanity and terrorism, and the *inter*-state enforcement regime see L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, 2011.

35 For an overview of the debate on cosmopolitan democracy and the relation between the governance at local, regional and global levels see D. Archibugi, 'Cosmopolitan Democracy and its Critics: A Review', in *European Journal of International Relations*, 2004, Vol. 10(3), at 437-473).

36 See R. Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge University Press, 2006.

within a region, or indeed globally, addressing a wide range of possible international threats. While collective security is an idea with a long history, its implementation in the practice has proved to be problematic. Several prerequisites have to be met for it in order to have a chance to work in an appropriate way and with an integrated approach of governance.[37] Collective security may have to evolve ensuring stability and a fair international resolution to *intra*-state conflicts. Whether this will involve more powerful peacekeeping forces or a larger role for the UN diplomatically, will likely be judged from a case to case basis. In any case, according to the outcomes of the studies of four decades of peacekeeping operations, it is proved that "turning peacekeepers into a fighting force erodes international consensus on their functions, encourages withdrawals by contributing contingents, converts them into a factional participant in the internal power struggle, and turns them into targets of attacks from rival internal factions".[38] These are the factors characterizing the practice on the ground in the multidimensional operations in the DRC, and in other peacekeeping operations which meant severe loss of human lives. These forces have to be trained and prepared for humanitarian protection measures and the emerging regime of international criminal justice should profit from such forces deployed on the ground.

First of all, in the context of civilian protection measures it needs to be noted that the Court's victims and witness protection program should help encourage witnesses to be more confident in contributing to the investigation, assisting the goal of accountability that the victims and civil society have been campaigning towards the Rome Statute. As the UK delegation stressed during their contribution to the Special Fund of the Court on relocation of victims and witnesses[39] "we remain concerned about continuing reports of witness intimidation and official interference. Those who attempt to subvert the search for justice should be aware that they also could find themselves

37 See A. Roberts and D. Zaum, *Selective Security: War and the United Nations Security Council since 1945*, International Institute for Strategic Studies, London, Abingdon: Routledge, 2008.

38 See R. Thakur, 'From Great Power Collective Security to Middle Power Peacekeeping' in H. Smith (ed.), *Australia and Peacekeeping*, Canberra, Australian Defence Studies Centre, 1990, at 20. See also R. Thakur, 'From Peacekeeping to Peace Enforcement: The UN Operation in Somalia', in *The Journal of Modern African Studies* Vol. 32, No. 3 (Sep. 1994), at 387-410.

39 The purpose of the Special Fund of the Court on relocation is to assist States Parties that are willing to host witnesses at risk but are not in a position to finance such support, and aims at fostering regional solutions for the relocation of witnesses at risk, thereby reducing the impact of relocations on their life. Using such arrangements, the Court also seeks to galvanize cooperation partners into strengthening national capacity to protect witnesses in regional States such as Kenya. This new modality developed by the Registry of the Court is complementary, and does not replace traditional Framework Agreements on Relocations, which are still very much needed by the Court.

accountable for their actions in The Hague, at the Court's premises".[40] The protection duties of civilians in situations of conflict and crime by the Security Council should embrace the Court's activities pressuring the States to preserve the right of the victims enforcing the law, while upholding operational measures of protection, relocation and rehabilitation. A joint international institution dealing with victims' protection measures would be absolutely required. It is important to recall the current trends in the practice applied on the ground during difficult political transitions characterized by serious violations of international humanitarian law and human rights, and which disturb international peace and security spreading at regional level, as in the case of the African Great Lakes Region, or in other regions and in the Middle East.

4.3.2 The politics of transition in conflict zones

What we currently see is that in many countries national security systems based on oppressive security are no longer tolerated by their own citizens. In situations of war characterized by humanitarian violations, the security sectors, especially armies, might even become a source of widespread insecurity by themselves (see the situations in Egypt, Tunisia, Morocco, Bahrain, just to name a few). In several countries in Africa, Asia and in the Arab world for instance, including countries in Europe and other western societies, the political transitions are characterized by the ambition to accomplish civil States and democratic governance.[41] The civilian revolutions against dictatorial, corrupted and violent regimes require a deep understanding of the local actors in order to provide appropriate support and civilian protection measures, while fighting against the impunity of serious crimes. The international (military) responses focusing on old methods of security, whereas in large-scale humanitarian crisis the security systems have collapsed, or are simply in the hands of autocratic and dictatorial regimes, or have always been inexistent, are controversial and not sustainable in the search of democratic order and stability. The current military engagements characterizing the international responses in internal armed conflicts undermine the credibility of multilateral treaties fostering stability and the rule of law, including the international governance institutions deriving from them. It needs to be noted that international treaties, their codification and the organizational structures deriving from them, suffered from the well-known shortcomings in the policy formulation with regard to the use or misuse of armies, their

40 See ICC-CPI-20101126-PR601. The Court relies on the cooperation of States for a number of key protection issues. International organizations are also the main stakeholders for the Court; discussions have been initiated with the UN Office of the High Commissioner for Human Rights and the possibility of establishing a joint international authority on protection issues.

41 See R. Luckham, 'The Military, Militarization and Democratization in Africa: A Survey of Literature and Issues', in *African Studies Review*, Vol. 37, Number 2, 1994, at 13-75.

illicit traffics to dangerous warlords, the constant formation of armed group and a myriad of non-state actors' not politically identifiable, which create chaos and violence exploiting resources and human lives. In several situations the members of the Security Council have violated the arms embargos compromising the neutrality of their intervention during violent political transitions (e.g. Libya and Syria). We can acknowledge that the politics of transition in conflict and post-conflict situations have to deal with massive atrocities with the absence or the 'failure' of the State and require appropriate intervention under important conditions.

4.3.3 Collective security and human security

The current challenges in the international legal order between statehood, sovereignty and international governance deserve discussion, including the transition of collective security and the use of military force. Collective security can be understood as a security arrangement in which all States cooperate collectively to provide security for all, by the actions of all against any States within the groups, which might challenge the existing order by using force.[42] The NATO was established to provide security for its member States against an external military threat. Since the end of the cold war the NATO has undertaken collective security missions in upholding the principles of the UN Charter on behalf of the UN showing its controversial *modus operandi*. The use of military force upholding the principles of the UN Charter can only be taken up by the UN Security Council under Chapter VII of the UN Charter. In such cases, since the UN does not have a standing army on its own, it can call upon the collective military capabilities of member States or alliances, such as indeed the NATO. As relevant analytical outcomes would emphasize, "the most striking feature of NATO involvement in the management of international crises remains the progressive erosion of the Security Council authority, which culminated with the intervention in Kosovo. The crisis in Iraq also demonstrated that there was no agreement among the members of the NATO on whether obtaining an authorization from the Security Council before resorting to force, was a legal requirement or only a matter of political expediency".[43] So said the collective security system is meant to protect civilians and not to undermine human rights and is also supposed to be accountable for its actions. But is this really the case looking at the practice applied on the ground?

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42 For major contributions see N. J. Schrijver, 'Reforming the UN Security Council in Pursuant of Collective Security', in *Journal of Conflict & Security Law*, Vol. 12, No 1, 2007, at 134. See also N. M. Blokker and N. J. Schrijver (eds.), *The Security Council and the Use of Force*, 2005.

43 For an analytical overview see T. Gazzini, 'Nato's Role in the Collective Security System', *Journal of Conflict and Security Law,* Vol. 8, No 2, 2003, at 231.

In the situation in Libya, the resolution of the Security Council authorized the military response using the language of the responsibility to protect civilians (RtoP or R2P). We will look at the ways such civilian protection duties have been performed earlier also in the Sudan and in the DRC. The protection of civilians during armed conflict is not a new concept but relatively established in international humanitarian law.[44] With the advent of the R2P, the international community accepted for the first time the collective responsibility to act, should States fail to protect their own citizens from mass atrocity crimes. The R2P, thus, imposes two obligations: the first upon each State individually, the second on the international community of States collectively. With embracing the responsibility to protect a long and unresolved debate over *whether* to act, became instead, a discussion about *how* and *when* to act. This was certainly progress. Unlike humanitarian intervention, the R2P aspires to ground national and international action in law and institutions of complementary nature. Rather than compromising sovereignty, the R2P aspires to tie together 'responsible sovereignty' and 'international responsibilities' to 'prevent', 'react' and 'rebuild'. In Libya, the arms embargos on the country had been violated prior to the military intervention reported by the Security Council. Even if it was the case that preventive measures had failed with the tyrant in charge and the violent regime in the country, the main concern refers to the political choice to let weapons enter into the country, making sure that they would reach the hands of the rebel groups, and finally taking part into the devastation of the armed conflict. So said, is such expression of militarization and regime change valuing the parameters of human security and the supranational rules enshrined in the UN Charter and the Rome Statute? The idealistic view is that it would have been more appropriate to release arrest warrants against the perpetrators of the range of crimes falling under the R2P, and only after performing the required international police and law enforcement, authorizing the use of force with the determination to catch the most important individuals responsible of the serious crimes disturbing peace and security in the country, and in the region. In this way the credibility of complementary tools would have received another impact globally, especially in regard to the ratification campaign of the Rome Statute.

4.3.4 The risks in the policy formulations

The main concern is that the prevention of serious humanitarian breaches and the protection of civilians during difficult political transitions are currently applied towards international security measures of militarization. There are serious doubts that such an approach is a reliable preventive measure able to challenge the mentality of war and crime during armed conflicts of a non-international character or *intra*-state conflics. Moreover, does global solidarity mean that military coalitions have the potential to challenge the

44 In this regard see the Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

ideology of despotism? The controversial policy issue is also related to the governance of terrorism and the use of weapons of mass destruction, including other serious global threats which have been left aside from any multilateral (legal) system. The fight against terrorism, or 'war on terror' against the worst enemy, characterized the 'fiction' of ideology in the security policy of some modern democracies, with Osama Bin Laden wanted death or alive. Such approaches have undermined universal values shared by the world community. Torture, imprisonment, liquidations and other methods used by secret intelligence have violated the basic requirements of human rights law, creating further extremisms and international fracture. The problem is that terrorism, as an international security threat, including its legal definition as international crime, is only at its initial stage of being considered in multilateral governance systems. Moreover, the raid by US Special Forces in Abbottabad, Pakistan, killing Osama Bin Laden, raised a number of legal questions that are likely to have far reaching implications for future military operations.[45] Particularly, the legal issues that arise in situations where a decision is made to target individuals, potentially outside the hostilities of arm conflicts, using military force. The analysis of these issues requires determination of what legal framework(s) properly regulates such use of force. Respectively, *a)* the legal justifications and counterarguments for military intervention targeting members of armed groups on the territory of another State; *b)* the applicability of international humanitarian law and/or human rights law to such operations; *c)* the implications of such operations for the evolving concept of direct participation in hostilities by civilians; and *d)* whether there is a need for new norms to regulate such operations. In the near future it would be required to see whether there is some space left in the provisional domain of the Rome Statute on terrorism, limiting the extent on which terrorism would only be left to the Security Council's domain.

4.3.5 Protecting civilians

In many civil wars combatants target civilians and relief workers with impunity. Beyond direct violence, deaths from starvation, disease and the collapse of public health the number of civilians killed by bullets and bombs increased. Millions more are displaced internally or across borders. Human rights abuses and gender violence are rampant. Under international law, the primary responsibility to protect civilians from suffering in war lies with belligerents, either by State or non-State actors. International humanitarian law provides minimum protection and standards applicable to the most vulnerable in situations of armed conflict, including women, children and

45 See A. S. Deeks, "Pakistan's Sovereignty and the Killing of Osama Bin Laden", *ASIL Insights*, Vol. 15, Issue 11, May 5, 2011, accessible at: http://www.asil.org/insights/volume/15/issue/11/pakistans-sovereignty-and-killing-osama-bin-laden J. Rollins, *Osama bin Laden's Death: Implications and Considerations*, Congressional Research Service Reports, May 5, 2011, accessible at: http://www.fas.org/sgp/crs/terror/R41809.pdf

refugees. Its compliance is an issue. Such laws must be respected. All combatants must abide by the provisions of the Geneva Conventions. All Member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court and all refugee conventions. Humanitarian aid is a vital tool for helping governments to fulfill this responsibility. Its core purpose is to protect victims, minimize their suffering and keep them alive during the conflict so that when war ends they have the opportunity to rebuild their shattered lives. The provision of international assistance is a necessary part of this effort. Donors must fully and equitably fund humanitarian protection and assistance operations.[46] Models of governance and capacity-building are absolutely required. This section concludes on the problematic intersection between international law and global politics on sensitive matters waiting for political solutions. Once again, political convergence is the key prior whatever institutional design and possible reforms of global governance systems which are explored in the next section and in the last chapter of this part. This paragraph reports the recommendations of the high-level panel on threats, challenges and change protecting civilians. The Secretary-General based this report in part on work undertaken by the United Nations High Commissioner for Refugees and also on the strong advocacy efforts by nongovernmental organizations. The Secretary-General prepared a 10-point platform for action for the protection of civilians in armed conflict. The Secretary-General's 10-point platform for action should be considered by all actors: States, NGOs and international organizations, in their efforts to protect civilians in armed conflict.[47]

From this platform, particular attention should be placed on the question of access to civilians, which is routinely and often flagrantly denied. United Nations humanitarian field staff, as well as United Nations political and peacekeeping representatives, should be well trained and well supported to negotiate access. Such efforts also require better coordination of bilateral initiatives. The Security Council can use field missions and other diplomatic measures to enhance access to and protection of civilians. Particularly egregious violations, such as those which occur when armed groups militarize refugee camps, require emphatic responses from the international community, including from the Security Council acting under Chapter VII of the Charter of the United Nations. Although the Security Council has acknowledged that such militarization is a threat to peace and security, it has not developed

46 See Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, Part 3, *A more Secure World: Our Shared Responsibility*, 'Collective Security and The Use of Force', Protecting Civilians, Para. 239, at 74, accessible at: http://www.un.org/secureworld/report2.pdf

47 See UN doc. S/2005/740, Report of the Secretary-General on the Protection of Civilians in Armed Conflicts, 28 November 2005, accessible at: http://www.responsibilitytoprotect.org/files/SGReportPOC.pdf

the capacity or shown the will to confront the problem. The Security Council should fully implement resolution 1265 (1999) on the protection of civilians in armed conflict. Of special concern is the use of sexual violence as a weapon of conflict. The human rights components of peacekeeping operations should be given explicit mandates and sufficient resources to investigate and report on human rights violations against women. Security Council resolution 1325 (2000) on women, peace and security and the associated Independent Experts' Assessment provide important additional recommendations for the protection of women. The Security Council, United Nations agencies and Member States should fully implement its recommendations. The current transition of global security systems requires political consensus. Such important requirement is discussed in the next section.

4.4 The requirement of political consensus

Section Outline

In this section it is argued that the structure of governance that has emerged after a series of decisions of the UN and the Rome Statute institutions represent an important step forward, but does not solve the fundamental problems in the global architecture dealing with international threats and crimes. The fact that seventeen years have elapsed since the adoption of the Rome Statute requires taking stock of the developments, assessing the collective achievements that have been made, and reflecting on those areas where action remains inadequate. The protection measures of civilians in conflict and post-conflict situations are still insufficient, while the principle of universality upholding the formulation of human security policy in governance systems is in transition. The following sections provide further clarification throughout the required risk assessments of the global architecture fostering peace, justice and security, which requires political convergence to fight against international threats and crimes, and which is expected to deal with States and individuals at the same extent. The requirement of political convergence is debated in the last chapter of this part dealing with the relationship between the UN regime and the emerging regime of international criminal justice falling under the Rome Statute. This section recalls the necessity to 'prevent', 'react' and 'rebuild' in mass atrocities situations with a constitutional strategy and a political *road map* integrating the governance of peace and justice for the sake of human security. The last paragraph of this section reports the pragmatic recommendations addressed by the UN High Level Panel on *Threats, Challenges and Change* which, in addition to the institutional reform of the UN, focused on the governance of *a)* the collective security and the use of force; *b)* the peace enforcement and peacekeeping capability; *c)* the post-conflict peace-building and *d)* the civilian protection duties. All of these clusters of governance require consensus based on human security expectations. For such sensitive governance issues human security is the most important requirement of the political convergence necessary.

In contrast with the traditional meaning of domestic governance of nation-states, which refers to decision-making defining expectations, granting public powers or verifying performance in domestic governing activities, we are well aware that the term global governance denotes the regulation of international relations between independent and sovereign States in the absence of a *supranational* authority. There is generally agreement between the different schools of governance that the extreme challenges taking place in societies in transition, combined with the shortcomings of domestic jurisdictions, require solid rather than symbolic international governance institutions based on the principles of neutrality, integrity and universality. The United Nations peacekeeping operations have traditionally followed three core principles: the consent among the parties to the conflict, the neutrality and impartiality of the UN forces deployed, and the use of force by UN personnel only in cases of self-defence.[48] The mission of mandates of universal character is to preserve norms and values internationally recognized for the sake of individual rights, while implementing strategies on matters of mutual concern and public good under the premises of 'effective' multilateralism.[49] The last decades have been characterized by several shortcomings of multilateral options. The systemic crisis of governance institutions became more complex with the economic and financial break downs occurred at domestic, regional and global levels. Nevertheless, while new opportunities arise for the governance systems of threats and crimes, on which the States may rely in case of serious domestic shortcomings, we are still far from the realization of any *supranational* system, which current interaction is only based on the early formation of mutual interests, including agreements and arrangements of cooperation based on secondary law, e.g. the relationship agreement between the United Nations and the International Criminal Court. The risk is the distance between governance systems of complementary character dealing with international threats and crimes. International governance institutions, States and non-States actors should forge a new consensus on a broader and more effective collective security system towards a deeper advocacy of systemic and global reforms centralizing civilian protection measures.

48 See for valuable contributions to this debate N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', *Journal of Conflict and Security Law* Volume 11, Issue 3, 2006, at 465-482. See also M. P. Karns, 'The Past as Prologue: The United States and the Future of the United Nations System', in F. A. Chadwick, G. M. Lyons, J. E. Trent (eds.), *The United Nations System: The Policies of Member States*, UNU, 1995, at 410. See for earlier legal contributions, T. Komarnicki, 'The Problem of Neutrality under the United Nations Charter', in *Transactions of the Grotius Society,* Vol. 38, 1952, at 77. See also C. Reith, 'International Authority and the Enforcement of Law', in *Transactions of the Grotius Society*, Vol. 38, 1952, at 109.

49 For an overview of the debate see K. Krause and A. Knight, *State, Society, and the UN System: Changing Perspectives on Multilateralism*, UNU Press, 1995.

4.4.1 *The required actions to 'prevent' 'react' and 'rebuild' in mass atrocity situations*

Simply reflecting on the efforts required by the world community it is obvious that a constitutional strategy at international level has the potential to influence national constitutions and vice versa. Such a strategy would neutralize the risks of undemocratic positions compromising judicial decisions and the important role of justice, which simply deserves a place in the arrays of international peace and security. On the other hand, the visibility of such a constitutional strategy would harmonize universal values in the different legal systems and traditions of the world community. The efforts should focus on keeping pace of the dialogue with local communities and civil society, including regional intergovernmental organizations, approaching the arena of non-state actors, groups, and activists promoting human rights, and also of others, extending the knowledge of political factions, armed groups, mercenaries and rebels characterizing each conflict situations. From another angle, the constant interaction between multilateral political actors enforcing international governance institutions is fundamental. In any case, the main responsibility remains in the hands of modern nation-states approaching such important issues in their constitutions and legal systems, while challenging the international legal order and vice versa. In our case, it is required to observe the constellation of international governance institutions and the necessary requirements of democratic governance of international threats and crimes, which require high standards of preventive diplomacy, mediation, negotiation and good standards of international cooperation preserving the progress of human security. Moreover, the development of capacity-building models of domestic governance are also required, if we also look at the shortcomings even in modern democracies and well established nation-states in western societies, including the collapse of regional governance systems, which are compromising the concept of security and global solidarity due to the disintegration of their unity of intents and their *supranational* character.[50]

It needs to be clarified that the International Criminal Court is not exclusively seen as a criminal and/or a human rights Court, but also as an enforcement mechanism of universal humanitarian principles in modern international relations. The preservation of the rule of law has been perceived as a principle of governance and as an important preventive tool of serious international crimes. In this study, the relationship between the United Nations and the International Criminal Court is interpreted as the

50 See P. De Grauwe, *The Governance of a Fragile Eurozone*, Centre for European Policy Studies (CEPS), May 2011. See also D. Gros, T. Mayer, *August 2011: What to do when the Euro crisis reaches the core*, CEPS, August 2011, accessible at: http://www.ceps.eu/book/august-2011-what-do-when-euro-crisis-reaches-core

opportunity for further inputs for a constitution of the world community.[51] The establishment of norms and compliance mechanisms universally recognized for the sake of stability in conflict situations characterized by extreme violence and by severe violations of international humanitarian law, the extension of multilevel jurisdictions and the way they are governed, are the main societal phenomena deserving detailed analysis. The establishment of global tools serving the domestic capacity-building with an impact on the security sectors in devastated nation-states (army, police and judiciary), including the protection duties of civilians during armed conflicts, violence and crime are interdependent phenomena which centralize the responsibilities of the States towards the international community but also the other way around. The question is whether the international community will centralize human security measures during *intra-* and *inter*-state conflicts based on the theory of constitutionalism or pluralism. Or better say the establishment of an international legal order able to control power politics throughout the rule of law, or the alternative ways of dealing with conflicts between legal frameworks in the absence of the political will upholding a *supranational* legal order.

4.4.2 The important requirement of political convergence

This section debates the issue of political convergence required and not yet found. It should be clear at this stage that the international tools upholding the responsibilities to 'prevent', 'react' and 'rebuild' situations of war and crime need implementations. In the emerging governance of complementary global regimes two main factors require new orientations: the current shift in international relations after post-cold war, characterized by a different nature of political transitions, regime clashes and warfare, and the necessity for global governance institutions to interact with each other on consensus and strategy-building, including resource sharing, exchange of expertise, and lessons learned. The practice applied on the ground, in conflict and post-conflict situations during humanitarian escalations deriving from violent political transitions, indicates that the principles of responsibility and accountability wait for configuration and implementation of civilian protection duties, including law enforcement engagements in accordance with the judicial outcomes of an independent international judiciary. The dilemma is whether modern nation-states are willing to adjust their consti-

51 For an overview of the debate on constitutional protection of humanitarian rights, the internationalisation of law and transnational constitutional principles see the reports of the conference *From Peace to Justice* organised by The Hague Academic Coalition (HAC) and held on 15 and 16 May 2008 at the Peace Palace in The Hague. The overall theme of the conference was *The Dynamics of Constitutionalism in the Age of Globalisation,* accessible at: http://www.hiil.org/events/past-events/ See also B. Fassenberg, 'The Meaning of International Constitutional Law', in R. St. John Macdonald, D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community,* (2005), at 837.

tutional parameters to universal values, preserving the legal and political order based on national and international responsibilities. After all, nation-states are responsible for the *status quo* of international relations not exclusively based on political realism which prioritizes their national interest and security over ideology, moral concerns, and political and social reconstructions.[52] Therefore, it is important to recall some of the challenges occurred in the post-cold war era in the context of international security;[53] the international humanitarian interventions during violent political transitions; the reach of universal governance institutions, and the efforts to centralize individuals and their fundamental rights in conflict and post-conflict societies. Political consensus on such issues, among other matters, is absolutely required.

4.4.3 Summary of the recommendations

In conclusion, it is required to recall again and summarize the recommendations of relevant observers of threats that have emerged since the end of the Cold War, including ongoing conflicts in the Middle East, threats of terroristic attacks, and genocidal *intra*-states conflicts.[54] Unfortunately, these are still waiting for collective achievements and reflect some areas where actions remain inadequate, very poor, or insufficient. The recommendations focus on: *a)* collective security and the use of force, *b)* peace enforcement and peacekeeping capability, *c)* post-conflict peace-building and *d)* civilian protection.

a) Collective security and the use of force

Article 51 of the Charter of the United Nations reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as

52 See J. Baylis, S. Smith, P. Owens, 'International and Global Security in the post-cold war era', in *The Globalization of World Politics. An Introduction to International Relations*, IV edition, Oxford University Press, 2008, at 253.

53 While the wide perspective of international security regards everything as a security matter, the traditional approach focuses mainly or exclusively on military concerns. For an overview of the evolution of this field of study see B. Buzan and L. Hansen, *The Evolution of International Security Studies*, Cambridge University Press, 2009.

54 See The Secretary-General's High-level Panel Report on Threats, Challenges and Change, *A more secure world: our shared responsibility,* A/59/565 (2004), Follow-up to the outcome of the Millennium Summit accessible at: http://www.unrol.org/doc.aspx?n=gaA.59.565_En.pdf See also M. W. Brough, J. W. Lango, H. van der Linden (eds.), *Rethinking the Just War Tradition*, 2007.

it deems necessary in order to maintain or restore international peace and security". The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has, as Kofi Annan often put it. The High-level Panel endorsed the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent. Such authorization by the Security Council and further escalation to justice should be characterized by compulsory cooperation with the Court, including resources and robust peace-making and peace-building.

In considering whether to authorize or endorse the use of military force, the Security Council should always address whatever other considerations may be taken into account. As discussed by Brough, Lango and van der Linden the following "five basic criteria of legitimacy" should be carefully considered: a) *seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended? b) *proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved? c) *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed? d) *proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question? e) *balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? The above guidelines for authorizing the use of force should be embodied in declaratory resolutions of both the Security Council and General Assembly.[55] An important additional element should be the appropriate considerations of the commission of international crimes and the violence on civilians spreading in multiple countries with the configuration of peace enforcement mandates supporting international justice activities on the ground (investigations and prosecutions).

55 M. W. Brough, J. W. Lango, H. van der Linden (eds.), *Rethinking the Just War Tradition*, 2007, at 3.

b) Peace enforcement and peacekeeping capability

The developed States should do more to transform their existing force capacities into suitable contingents for peace operations. Member States should strongly support the efforts of the UN Department of Peacekeeping Operations, building on the important work of the Panel on UN Peace Operations of the UN Secretariat, to improve its use of strategic deployment stockpiles, standby arrangements, trust funds and other mechanisms in order to meet the tighter deadlines necessary for effective deployment. The States with advanced military capacities should establish standby high readiness and self-sufficient battalions that can reinforce UN missions, and should place them at the disposal of the UN. In regard to peacekeeping operations the Brahimi report is a useful tool to evolve with civilian protection duties. In response to criticism, particularly of the cases of sexual abuse by peacekeepers, the UN should take further steps toward reforming its operations. The Brahimi report was the first of many steps to review former peacekeeping missions, isolate flaws, and take steps to delimit mistakes ensuring the efficiency of future peacekeeping missions. The UN has vowed to continue to put these practices into effect when performing peacekeeping operations in the future. However, Brahimi's call that the UN missions have the means commensurate to their mandates has never been fully implemented. Mandates express ambitious protection of civilian agendas, while troop contributing countries are wary of putting their forces in harm's way to do just that.[56]

The technocratic aspects of the UN peacekeeping reform process have been continued and revitalized by the DPKO in its Peace Operations 2010 reform agenda. This included an increase in personnel, the harmonization of the conditions of service of field and headquarters' staff, the development of guidelines and standard operating procedures, and improving the partnership arrangement between the Department of Peacekeeping Operations (DPKO) and the United Nations Development Programme (UNDP) with the African Union and the European Union. Besides, the regional and international support should be complemented through national cooperation at all levels. The 'UN Peacekeeping Operations: Principles and Guidelines', incorporates and build on the Brahimi analysis. This needs further updates about the presence of complementary actors on the ground such as investigations and prosecutions of international crimes and the support they would require.[57]

56 See L. Arbour, *Doctrines Derailed?: Internationalism's Uncertain Future*, Global Briefing 2013 opening speech from the International Crisis Group's President & CEO Louise Arbour, accessible at: http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx

57 See USG/DPKO, UN Peacekeeping Operations Principles and Guidelines, 2008, accessible at: http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf

c) Post-conflict peacebuilding

Special representatives of the Secretary-General should have the authority and guidance to work with relevant parties to establish robust donor-coordinating mechanisms, as well as the resources to perform coordination functions effectively, including ensuring that the sequencing of United Nations assessments and activities is consistent with the priorities of governments. The Security Council should *mandate* and the General Assembly should *authorize* funding for disarmament and demobilization programs from assessed budgets of United Nations peacekeeping operations. A standing fund for peace-building should be established and finance the recurrent expenditures of a nascent government, as well as critical agency programs in the areas of rehabilitation and reintegration of combatants, child soldiers and the victims and witnesses of international crimes.

d) Protecting civilians

All combatants must abide by the Geneva Conventions. All Member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court and all refugee conventions. The Security Council should fully implement resolution 1265 (1999) on the protection of civilians in armed conflict. The Security Council, United Nations agencies and Member States should fully implement resolution 1325 (2000) on women, peace and security. Member States should support and fully fund the proposed Directorate of Security and accord high priority to assisting the Secretary General in implementing a new staff security system in the short, middle and long terms.[58]

58 See Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, *A more Secure World: Our Shared Responsibility*, Annexes, at 97, accessible at: http://www.un.org/secureworld/report2.pdf